NO. 22,084

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, ET AL

Appellee,

FILED

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APPELLANT'S REPLY BRIEF

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INTRODUCTORY STATEMENT

The appellee's brief seems to gloss over so many points so as to lose sight of the principal issues in the case. These issues all evolve about the current standards for a fair hearing as required by due process clause of the 14th Amendment to the Federal Constitution. No effort is made in this reply brief to cover appellee's arguments covered by the appellant's principal brief.

UNDER MEMPA v. RHAY APPELLANT MUST BE RELEASED

Apparently the appellee would have this Court believe that a State accusation of a criminal offense is not always a State accusation of a criminal offense, particularly when such an accusation is made against an alleged parole violator at a parole violation hearing. In fact an accusation of a criminal offense by a State is always such an accusation regardless of how it is labeled or what form it may take.

By now it is well established that one accused of a crime is entitled to the assistance of counsel whenever the accusation is made. The most recent pronouncement on this point is in the combined cases MEMPA v. RHAY and WALKLING v. WASHINGTON STATE BOARD, 1967, 19 Led 2d 336, decided during

the pendancy of this proceeding. These cases involve the revocation of probation. While pointing out the many ways that an attorney was necessary at probation violation hearings the court said (page 340);

> *"...That appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."*

In making these statements the court cited in the opinions such well-known cases as TOWSEND v. BURKE, 1946, 334 US 736, 92 Led 1690; MOORE v. MICHIGAN, 1957, 355 US 155, 2 Led 2d 167; HAMILTON v. ALABAMA, 1961, 368 US 52, 7 Led 2d 114; and GIDDEON v. WAINRIGHT 1963, 372 US 335, 9 Led 2d 799. It could also have referred to JOHNSON v. ZERBST, 1938, 304 US 416; ESCOBEDO v. ILLINOIS, 1962, 378 US 478 and DOUGLAS v. CALIFORNIA, 1962, 372 US 353 which have extended the right to counsel under due process of the Federal Constitution.

The application of the rule of MEMPA v. RHAY, supra, to the present fact situation is simple. The State of California was the principal actor, acting through its Adult Authority and its parole officials. Through one of these officials the State drew up charges against appellant of specific "violations" as reproduced on pages 2 and 3 of the appellee's brief. The first of these "violations" charged is

a penal offense or crime under California penal code 3059; the third involves bad checks, a clear-cut penal or criminal matter under California penal code 476(a).

The appellee's brief on page 4 admits then that California, through its Adult Authority, held a "hearing" on these specific criminal offenses and other charges at the California San Quentin prison, and that at this hearing the appellant after pleading not guilty was found guilty of the charges. Thus, the appellant was asked to plead, and did in fact please not guilty of two criminal charges and was found guilty on these charges by the State.

What makes this matter particularly onerous is the fact that the appellant at that time of the hearing had counsel available to him but was denied the assistance of this counsel. This matter is also onerous because the place of hearing was so far removed from the area where the alleged violations occurred that he did not have a reasonable chance of presenting even a bona fide defense. Without such a defense he was "found guilty" and his parole was revoked solely on the basis of a hearsay document containing the alleged "violations".

Such an alleged "hearing" as transpired in the appellant's case was obviously a criminal proceeding. It is not seen how this appellee can label it anything else. The

State alleged criminal acts and found appellant guilty of these acts without even allowing him the assistance of counsel. The appellee would have this court believe that a parole violation is not in fact a criminal proceeding. This is patent nonsense.

In a criminal proceeding a person is charged with committing a crime and if found guilty is punished as by imprisonment. In the appellant's case, the appellant was accused and a "hearing" was held as to whether or not he was guilty. Obviously the purpose of this "hearing" was to revoke the appellant's parole if he was guilty of any wrong-doing so as to cause further imprisonment. Imprisonment is imprisonment regardless of how it comes about. Here it is a part of the criminal process carried out by the State of California, regardless of how it is labeled.

In MEMPA v. RHAY, supra, it was held in a probation matter that an accused was entitled to appointed counsel because of the 14th Amendment to the Federal Constitution. Such a probation matter is different from a parole violation matter only as to degree; the two certainly do not differ in kind. At the parole violation hearing in this case the appellant was found guilty of crimes. This may relate to rehabilitation but it still is binding by the State on criminal charges.

UNDER APPELLEES' CASES APPELLANT MUST BE RELEASED

This court in ANKETA v. WILSON (CA9, 1967) 373 F.2d 582 (cited by the appellee) stated that there was little real difference between parole and probation as follows (p. 584):

> *"...We can see little substantive difference between the two (parole and probation)".*

If this court last year could see little substantive difference between probation and parole certainly it will disregard the appellee's arguments that they are now different and follow the mandate of the Supreme Court as set forth in MEMPA v. RHAY, supra, and order appellant's release because he was denied counsel.

Even if this Court were to refuse to rule for the appellant because he was denied the representation of the counsel available to him, it must under even the decisions cited by the appellee grant the appellant relief sought. The decision WASHINGTON v. HAGEN (CA3, 1960) 287 F.2d 332 cited by appellee clearly indicates that if a parollee doesn't get a fair hearing it is a matter for the Court to remedy in a habeus corpus proceeding. In so stating the court in WASHINGTON, supra, cited with authority US ex rel. McCREARY v. KENTON, DC D. Conn., 1960, 190 FS 689, which clearly indicated that a parole

violation hearing must be more than "pro-forma" proceeding in which in effect no consideration is given to the alleged parole violator's position.

The uncontroverted record here clearly indicates facts indicating that the alleged's hearing was a "pro-forms" proceeding. The uncontroverted affidavit of the appellant (R111-14) specifies in paragraphs 9 and 10 that there was no transcript made, that no one testified against him, that no documentary evidence was presented other than an unverified document which is believed to be the document containing the charges reproduced on pages 2 and 3 of appellee's brief. In short, this hearing was a star chamber proceeding which courts would have held in nullity even prior to the present due process requirement for counsel.

Even the appellees cases give an indication as to what was regarded for a fair hearing under prior due process decisions. The case U.S. v. REGAN (CA7, 1949) 177 F.2d 303, cited by appellees involved a fact situation where the court itself read the transcript of the hearing and concluded on the basis of the transcript that the hearing was fair. RICHARDSON v. MARKLEY, (CA7 1965) 339 F.2d 967, cited by the appellees involved a fact situation wherein counsel representation was waived; it specifically stated (p. 970):

> *"...We believe that in fairness to a parolee a preliminary hearing should be promptly held at a location at or near the place of alleged violation of parole."*

San Quentin definitely is not at or near the Los Angeles area. Appellant's hearing was held at San Quentin, not in the Los Angeles area where he was alleged to have committed the variout crimes charged against him.

From this record this Court can see for itself that the alleged "hearing" accorded the appellant was nothing more or less than a sham conducted far from any acts that the appellant may have committed, far from witnesses, far from proof, on the basis of a single unverified document based upon a wife who was striking out against him. A "hearing" under these conditions is not in fact a hearing but is nothing less than a cruel hoax.

THIS COURT HAS JURISDICTION

On pages 19, 20 and 21 of their brief the appellee's have for the first time challenged the jurisdiction of this Court on the ground that the appellant has failed to exhaust his state remedies. It is believed that the appellees

are at this stage of the proceedings estoppel to raise this issue. No where in the record below did the appellees deny the appellant's right to Federal jurisdiction. They should not therefore have the right to bring this question up on appeal.

The jurisdiction of this Court is as indicated on the initial page of the appellant's brief. In 1964 this Court specifically held in SCHIERS v. PEOPLE OF THE STATE OF CALIFORNIA (CA9 1964) 333 F.2d 173, that once an issue of denial of constitutional rights was presented to a State Court and denied it was unnecessary for a petitioner to institute further State proceedings. The appellees have made no effort to distinguish this case, to show that it has been overruled or anything of the kind.

Instead the appellees have relied as authority upon a subsequently decided case, MOREHEAD v. STATE OF CALIFORNIA, (CA9, 1964) 339 F.2d 170 where a petitioner appearing in pro per was denied relief since he had not succeeded in getting California Courts to act on his request for relief on constitutional grounds. In MOREHEAD the State Courts had never denied relief whereas in this case the petitioner was specifically denied any relief by a Court of the State of California (R 116, 117 and 118). As further authority in its brief the appellees have cited FAY v. MOIA, 1963, 372 US 391, 9 Led, 2d

837, a case in which the petitioner had failed to exhaust his right of appeal in the State Courts and subsequently sought relief by habeus corpus in the Federal Courts. In an exhaustive opinion in this case clearly indicating that Federal Courts always have the right by habeus corpus to remedy a denial of due process by a State Court, the Supreme Court held that the petitioner had the right to the writ.

Thus even the authorities cited by the appellees support the fact that this Court can and in fact should entertain and grant the requested writ. This Court has specifically said that it is only necessary for a State Court to deny relief on a constitutional ground once. This happened in the present case. With the record of the conduct of the State of California in the present case one can hardly blame the appellant for seeking Federal and not State relief as soon as possible.

CONCLUSION

The State clearly charged the appellant with crimes in such a manner that if convicted he would be imprisoned. It further held a "hearing" with respect to charges against him including the criminal charges, far from the area of any alleged wrong doing. It denied him of the counsel that had been retained to assist him at the hearing. It conducted the hearing without a reporter. It asked him to plead to the charges, including

criminal charges, against him and, on the basis of a single unverified document which on its face is based upon the allegations of a vindictive wife, found him guilty of these charges. As a result of this hearing the appellant is now in prison. With these facts the appellant rightfully wonders if the State of California of any of its instrumentalities have an element of fairness and can hardly have been expected to have gone back to this State for further relief.

This court has recently held that probation and parole violation matters are substantially equal or the same. MEMPA v. RHAY makes it clear that counsel is required in a probation matter. Therefore counsel is required also in a parole matter as is shown in the appellant's principal brief. For years the right of counsel has been fundamental at parole violation hearings in other areas, as required by due process, under the 14th Amendment to the Federal Constitution. This is shown by cases cited in appellant's principal brief.

At this point the appellant is indigent and can not afford counsel. Documents of all sorts have undoubtedly disappeared. The memories of witnesses have undoubtedly dulled. As pointed in GLEN v. REED, (CA, DC Cir., 1961) 289 F.2d 462, under these circumstances the appellant must be

released because it would be impossible to have a fair hearing and to undo the wrongs which have been done.

Respectfully submitted,

Edward D. O'Brian
Attorney for Appellant

Anaheim, California
January 30, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward D. O'Brian
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Brief were placed in the United States mail, with postage fully prepaid, addressed to DORIS H. MAIER, Assistant Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, California, on this 2nd day of Feb, 1968.

Edward D. O'Brian
Attorney for Appellant